CITATION: Konkle v. Ontario (Human Rights Tribunal), 2025 ONSC 4071
DIVISIONAL COURT FILE NO.: 804/24-JR
DATE: 20250711

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: OWEN KONKLE, as represented by their Litigation Guardian, JENNIFER KORSTANJE, Applicant

AND:

HUMAN RIGHTS TRIBUNAL OF ONTARIO and CANADA GAMES COUNCIL, Respondents

BEFORE: Backhouse, Lococo and Shore, JJ.

COUNSEL: *Caroline V. (Nini) Jones*, for the Applicant

Sabrina Fiacco, for the Respondent, Human Rights Tribunal of Ontario

Roderic McLauchlan and *Camille Beaudoin*, for the Respondent, Canada Games Council

Shivani Chopra and *Kayley Cheyenne Leon*, for Special Olympics Ontario and Special Olympics Canada

Nicole A. McAuley, for Athletics Ontario

Barry W. Adams, for Athletics Canada

HEARD at Toronto: July 7, 2025

ENDORSEMENT BY THE COURT

[1] Owen Konkle, as represented by their Litigation Guardian Jennifer Korstanje, seeks judicial review of the Final Decision of the Human Rights Tribunal of Ontario (the "HRTO") dated December 3 2024 (2024 HRTO 1716), dismissing his discrimination claim against the Canada Games Council. The applicant also challenges the HRTO's Initial Decision dated June 7, 2024 (2024 HRTO 810) and the Reconsideration Decision dated September 4, 2024 (2024 HRTO 1226).

[2] The applicant's discrimination claim arose from a change in the eligibility requirements for special athletes (being athletes with intellectual disabilities) to participate in the Canada

Games. The change in the eligibility requirements did not apply to para-athletes (being athletes with physical disabilities) or able-bodied athletes.

[3] The HRTO found that it did not have jurisdiction to proceed, since the application was filed one day beyond the one-year limitation period set out in the *Human Rights Code,* R.S.O. 1990, c. H.19 (the "*Code*"). The HRTO also declined to extend the filing time limit, finding that it was not satisfied that the delay was incurred in good faith.

[4] The applicant submits that the HRTO's decision should be set aside since, among other things, it was unreasonable for the HRTO to conclude that the delay was not incurred in good faith. We agree.

[5] Well within the one-year limitation period, the applicant had made an application to the Canadian Human Rights Commission (the "CHRC"), alleging discrimination against the Canada Games arising from the same change in the eligibility rules. On August 1, 2023, the CHRC found that the complaint was not within federal jurisdiction, but may be a provincially regulated matter, subject to the HRTO's jurisdiction. The applicant brought his HRTO application nine days later (which included a three day long weekend) on August 11, 2023, which the HRTO found was one day beyond the one-year limitation period set out in the *Code*. As well, the applicant through their Litigation Guardian had already made his objection to the change in eligibility requirements known to the Canada Games Council within the one-year limitation period and continued to do so, including at the time that the applicant first competed in the event under the new eligibility rules on August 9, 2022.

[6] The HRTO found that the applicant had not established a good faith basis under s. 34(2) of the *Code* for extending the limitation period.

[7] Section 34(2) provides:

> 34(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

[8] The HRTO gave the following reasons for denying the extension of the limitation period for one day:

> [15] The Tribunal has set a high bar for determining if an applicant has provided a good faith reason for the delay in filing their Application. As noted in Miller, to establish the delay was incurred in good faith, the applicant must show something more than simply an absence of bad faith.
>
> [16] In the Application and the response to the Request, the applicant argued that the delay was in good faith because they

> previously filed an application citing the same allegations with the Canadian Human Rights Commission (CHRC) on June 9, 2023. On August 1, 2023, the CHRC denied jurisdiction on the basis of the matter not being federally regulated.
>
> [17] I cannot accept this good faith argument because the applicant has not explained why they could not apply to the Tribunal between August 1, 2023 and August 10, 2023.

[9] In our view, it was unreasonable for the HRTO to find that the applicant had not established good faith because of the six business days it took from the time the CHRC denied jurisdiction to file a fresh application with the HRTO.

[10] This is not a case of willful blindness, simple inadvertence or acting with an ulterior motive. The decision to bring the application in the CHRC was an entirely reasonable one. This is brought home by the fact that counsel for the Canada Games Council initially took the position in its response to the HRTO application after it was filed that there should be an early dismissal because jurisdiction fell within the CHRC. Even the HRTO at the outset requested additional submissions about whether jurisdiction lay with the CHRC and referred the parties to *Masood v. Bruce Power*, 2008 HRTO 381, a decision which sets out the procedure to dismiss an application at the preliminary stage based on the HRTO lacking jurisdiction.

[11] This case is distinguishable from *Cristiano v Canadian Society of Immigration Consultants*, 2022 HRTO 717, relied upon by Special Olympics Ontario and Special Olympics Canada and similar decisions, which found that a lack of knowledge about the HRTO does not constitute a good faith explanation for delay within the meaning of s. 34(2).

[12] It is clear that the applicant always intended to pursue his rights for the alleged violation of his human rights. This is not a case of party being unaware of their rights and making no inquiries about options for pursuing the alleged wrong: (see *Lutz v. Toronto (City),* 2009 HRTO 1137, where the Tribunal held, referring to a number of court decisions, that a delay may be found not to have been incurred in good faith where a party says simply that they were not aware of their rights, and made no inquiries about options for pursuing the alleged wrong.

[13] It is clear that the applicant moved with dispatch upon being advised that the CHRC denied jurisdiction. It is not a reasonable approach to require an accounting for every minute of every day of delay. The question the HRTO should have turned its mind to is whether the application initially being brought in the CHRC was a good faith explanation for being one day late in filing its application with the HRTO and whether the applicant moved with reasonable dispatch upon being advised of the CHRC declining jurisdiction.

[14] In these circumstances, we consider it unreasonable to conclude that the delay was not incurred in good faith and set aside the decisions on that basis. It is not necessary that we consider the applicant's other arguments for setting aside the decisions.

[15] The Canada Games Council conceded that if this panel found that there was good faith, it was not alleging prejudice, the second requirement under s. 34(2). In these circumstances, the matter is remitted to the HRTO for a determination on the merits.

[16] As explained above, the facts of this case distinguish it from a number of HRTO decisions where good faith was found not to have been established. However, there is nothing in s. 34(2) that limits it to the very rare exception. Even without the distinguishing facts in this case, it is difficult to see how it would be reasonable to find that the requirements of s. 34(2) were not met in the case of a short delay and no substantial prejudice exists.

[17] As agreed by the parties, there is no order for costs.

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Backhouse J.

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Lococo J.

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Shore J.

Released: July 11, 2025